IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1487

ROBERT P. HERZOG, RECEIVER
*Petitioner,*

v.

THE FIRST NATIONAL BANK OF BOSTON,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

## MEMORANDUM OPPOSING CERTIORARI

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April 1, 1983

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The Court of Appeals for the First Circuit applied the correct legal standard — abuse of discretion — to review the decision of the district court. This standard of review has been expressly commanded by this Court. *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). There is thus no conflict between the only legal issue presented by the decision of the First Circuit and any decision of this Court. *See also Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 102 S.Ct. 2099, 2106-07 (1982) (disposing of petitioner's claim of a

conflict with *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958) ). Further, there is no conflict between the decision of the First Circuit and that of any other Court of Appeals. *See, e.g., In re Fine Paper Antitrust Litigation*, 685 F.2d 810, 823 (CA 3 1982); *Marshall* v. *Segona*, 621 F.2d 763, 766-67 (CA 5 1980); *Brown* v. *McCormick*, 608 F.2d 410, 414 (CA 10 1979); *Dellums* v. *Powell*, 566 F.2d 231, 235 (CA DC 1977). Petitioner's asserted conflicts with the law of these Circuits reflect no more than differing factual assessments in different cases. All, moreover, were decided prior to *National Hockey League*.

The Court of Appeals correctly applied the abuse of discretion standard to the facts in the record on appeal. Petitioner distorts selected parts of the opinion below in an attempt to suggest the appearance of confusion in the *ratio decidendi*. No such confusion exists, however, as perusal of the First Circuit's complete opinion will demonstrate. All petitioner's contentions are in any event entirely fact-specific. They thus present no issues appropriate for the exercise of this Court's certiorari power.*

There is an additional reason why issuance of the writ should not be contemplated here. Contrary to the assertion at p. 3 of the petition, the claims of "the Overmyer entities" have been *fully* presented in a trial. That trial, which took over seven weeks, resulted in a 116 page decision in favor of the respondent! *Hadar Leasing International Co.* v. *D. H. Overmyer Telecasting Co. (In re D.H. Overmyer Telecasting Co., Inc.)*, 23 B.R. 823 (Bankr.

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*Because the petition is facially frivolous, we have not addressed the numerous errors contained therein. For example, all the statutory cites and the argument thesis advanced at pp. 7-10, are simply inapposite. The D.H. Overmyer Co., Inc. (Ohio), Chapter XI bankruptcy proceedings were commenced in 1973, and are therefore governed by the provisions of the Federal Bankruptcy Act, not the 1978 Bankruptcy Code cited by petitioner. *See* Pub. L. No. 95-598, § 403(a), 92 Stat. 2549, 2683 (1978).

N.D. Ohio 1982). That decision has thus completely vitiated the claims which petitioner asserts remain unresolved, and has effectively mooted the sole reason advanced by petitioner for seeking further review in this Court.

The petition should be denied.

Respectfully submitted,

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April 1, 1983

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